

means of livelihood or gain; a calling; formerly used very widely, including professions; now usually applied to a mercantile occupation and to a skilled handicraft, as distinguished from a profession."

In confirming the finding of the Special Commissioners that the respondent was not carrying on a trade or business of dealing in the said lands the learned judge reiterated what he said in *E. v. Comptroller of Inland Revenue*:⁽¹⁾

"In the final analysis the answer to this appeal is fairly simple. The transaction by the appellant in this case must be taken as an isolated transaction. *As an isolated transaction, it was an adventure in the nature of trade. In the absence of a definition of 'trade' extending that term to an adventure in the nature of trade, as the English Income Tax Acts do, this single transaction did not constitute a trade of the appellant within the meaning of section 10(1)(a) of the Income Tax Ordinance, 1947.* As it was but a single business transaction carried out by the appellant and not part of a business carried on by him, it did not constitute the business of the appellant either within the meaning of the same section. The profit arising therefrom is therefore not subject to tax under that section."

The third ground is without merit.

I would therefore dismiss the appeal with costs and affirm the decision of the learned judge.

Suffian L.P. concurred.

Appeal dismissed.

Solicitors: *Shearn Delamore & Co.*

B. v. COMPTROLLER OF INLAND REVENUE

[F.C. (Azmi L.P., Gill and Ong Hock Sim F.J.J.)
June 22, 1974]

[Ipoh — Federal Court Civil Appeal No. 10 of 1973]

Income Tax — Hindu Joint Family — Personal law of Hindus in Malaysia — Whether provisions as to Joint Hindu Family contrary to Constitution — Income Tax Ordinance, 1947, s. 57 — Federal Constitution, Arts. 4 & 8.

This was an appeal from the decision of the High Court ([1973] 1 M.L.J. 123). The questions of law submitted before the High Court were formulated as follows:—

- (1) that section 72 of the Income Tax Act, 1967 (section 57 of the Income Tax Ordinance) which deals with Hindu Joint Families does not apply to Hindus whose domicile is Malaya and can only apply to Hindus who are domiciled in India;
- (2) if section 72 of the Income Tax Act, is held to apply to the appellants it is in violation of Article 8 of the Constitution of Malaysia and therefore void.

The learned judge declined to consider the second question as he considered that this question was a matter exclusively within the jurisdiction of the Federal Court. He rejected the appellant's contention on the first question. The appellant appealed to the Federal Court.

Held, dismissing the appeal: (1) Hindu law is the personal law of the appellants and by reason of Clause (5) thereof Article 8 of the Federal Constitution does not invalidate the provision relating to Hindu Joint Families in section 72 of the Income Tax Act (or section 57 of the Income Tax Ordinance, 1947);

(2) the two Hindu families in this case have by personal choice regarded their property as that of a joint Hindu property. The basis of their liability to pay income tax was not solely based on the fact that they were of the Hindu

religion but also on the fact that they have always regarded their joint property as belonging to one unit and the income of that property as the income of one person.

Cases referred to:—

- (1) *Lazard Brothers v. Midland Bank Ltd.* [1933] A.C. 289.
- (2) *Surinder Singh Kanda v. Government of Federation of Malaya* [1962] M.L.J. 169.
- (3) *Gerald Fernandez v. Attorney-General of Malaysia* [1970] 1 M.L.J. 262.
- (4) *Yeoh Tat Hong v. Government of Malaysia* [1973] 2 M.L.J. 86.
- (5) *Mammud Keyi v. Wealth Tax Officer* A.I.R. 1962 Kerala 110.
- (6) *Narayanamurthy v. Commissioner of Wealth Tax* A.I.R. 1964 Orissa 129.
- (7) *Keloth Mammad v. Wealth Tax Officer* A.I.R. 1966 Kerala 77.
- (8) *V.V.R. Verma v. Union of India* [1969] S.C. 1094.
- (9) *Sri Raghunandha v. Brozo Kishore* (1876) I.L.R. 1 Mad. 69, 81.

FEDERAL COURT.

M. Sivalingam for the appellants.

Mohamad Nizar bin Idris (Senior Federal Counsel) for the respondents.

Azmi L.P.: This is an appeal against the judgment of the High Court dismissing a joint appeal against two deciding orders of the Special Commissioners of Income Tax.

The first appeal is by B. as the Karta of the B. Hindu Joint Family and the other also by him, but as agent and then subsequently as the administrator of the Estate of N. deceased.

N. was the Karta of the N. Hindu Joint Family.

The facts found by the Special Commissioners may be stated briefly as follows: By Notices of Amended Assessment dated 2nd December 1967, the Comptroller of Income Tax raised assessments of income on the Karta of B. Hindu Family, for the years of assessment 1961 to 1966.

By Notices of Amended Assessment dated 2nd December 1967 the Comptroller raised assessment of income tax on the Karta of N. Hindu Joint Family.

B. acting in his respective capacity appealed against the assessments to the Special Commissioners. They dismissed both appeals.

B. is a son and N., a brother of Shuparshad.

Shuparshad s/o Moolchand was born in India. When Moolchand died in India in 1918, he left six sons namely.

- (1) Shuparshad,
- (2) Daudayal,
- (3) N.
- (4) Kelascharan,
- (5) Bishambar Dayal and
- (6) Inderbhan.

Shuparshad came to Malaya in 1910 and after working for some time as an employee, ran a sundry shop in partnership with another person who later left the partnership. Subsequently all his brothers came to Malaya one after another to assist him in the business.

Between 1929 and 1938 the business was carried on at Tapah in Perak and after 1931 also at Tanah Rata, Cameron Highlands, under the style of Shuparshad & Bros. Shuparshad managed the business until 1935 when he returned to India and his brother N. took over the management of the business. Daudayal, a few months later also left. He never came back to Malaya. Whenever N. went to India on leave he entrusted the management of the business to Kelascharan.

Shuparshad died in India on 13th August 1937 leaving a widow Kailwati and two sons, B. (the appellant) and Srinivas. Bishambar Dayal died in India on 10th October 1947 leaving a widow Premwati.

On 24th June 1950 the Comptroller informed the accountants of Shuparshad & Bros. that he intended to treat the business of Shuparshad & Bros. as belonging to a Hindu joint family and he received a reply admitting that the firm belonged to an undivided Hindu Family.

On 14th April 1952 a deed of partition was executed whereby the properties of the joint family were partitioned into two. One party consisted of N., Kelascharan, B., Srinivas, Kailwati (f) and Premwati (f) and the other party consisted of Daudayal and Inderbhan.

On 15th February 1958 N., Kelascharan, B. and Srinivas and the two widows Kailwati and Premwati signed a deed of partition so that each of the six members was allotted his or her separate share.

The Special Commissioners also found that there has been the N. Hindu Joint Family in existence, of which N. was the Karta, and possessed family properties in Malaya. Similarly the share which was allotted to B. in the partition of the properties was ancestral property as regards his sons. He and his sons remained joint and there has been in existence the B. Hindu Joint Family of which B. was the Karta and that they have joint family properties in Malaya. These facts were confirmed by the Returns of Income which they submitted to the Director-General signed by N. himself as the Karta, and returns signed by B. as Karta of the B. Hindu Joint Family.

N. by 1958 or just before, had acquired the citizenship of this country.

B. had also become a citizen by registration on 17th February 1958.

The Special Commissioners rejected the appellants' contention that the income tax legislation would apply only to Hindu joint families who are not citizens of Malaysia and secondly if it applied to citizens the said legislation was *ultra vires* the Federal Constitution. They did so purely on the ground that the appellants have failed to prove that they were not Hindu joint families.

The appellants appealed to the High Court by way of a case stated and both appeals were consolidated and heard together and the questions of law submitted before the High Court were formulated as follows:

- A (1) that section 72 of the Income Tax Act 1967 which deals with Hindu joint families does not apply to Hindus whose domicile is Malaya and can only apply to Hindus who are domiciled in India and
- (2) if section 72 is held to apply to the appellants it is a violation of Article 8 of the Federal Constitution and therefore void by virtue of Article 4 of the Constitution.

B

The learned judge declined to consider the second question because he considered that this question, being one affecting the Federal Constitution, was a matter exclusively within the jurisdiction of the Federal Court. He rejected the appellant's contention on the first question. The appellants appealed to this court against the decision of the High Court.

C

It was pointed out to us at the outset of the hearing by the respondent that the relevant provisions of the Income Tax legislation in this case would appear to be section 57 of the repealed Income Tax Ordinance 1947, and not section 72 of the Income Tax Act 1967.

D

For convenience of reference I set down the two provisions:—

(1) *Section 57 of the Ordinance:*

"The income of a Hindu Joint Family shall for the purposes of this Ordinance be assessed and charged on the manager or 'karta' of such Hindu Joint Family and he shall be liable for payment of the tax accordingly."

E

(2) *Section 72 of the 1967 Act:*

"The income of a Hindu joint family (and any income of the family's manager or karta in his capacity as such, being income by virtue of sections 55 to 59) shall be assessable and chargeable on the family's manager or karta, who shall accordingly be assessable and chargeable to tax on behalf of the family."

F

Mr. Sivalingam counsel for the appellant conceded that the relevant law is section 57 of the Ordinance but said that this would not materially affect his arguments.

G

As to the first question Mr. Sivalingam's arguments may be briefly restated as in the following paragraphs:—

- (1) Both B. and N. were at the relevant time citizens of Malaysia and thus their domicile during the period of assessments was this country. Their personal law would depend on their domicile. (See the judgment of Thomson J. (as he then was) in *Dorothy Yee Yeng Nam v. Lee Fah Kooi* [1956] M.L.J. at page 263.)

H

Again:

"The object of the law in searching for and ascertaining a man's domicile is to ascertain the particular municipal law by which his private rights are regulated and deferred." (See *re Graignish* [1892] 3 Ch. 180 at pp. 188 to 189). Counsel also cited other authorities to the same effect.

I

- (2) The Hindu joint family law should not therefore be applied to Hindus domiciled here. Apart from that the law of the Hindu joint family is not suitable to the conditions existing in this country and the application of the law will result in injustice, inconvenience and confusion. Hindu law should be applied so far as circumstances permit in the same way the common law of England is required by section 3 of the Civil Law Ordinance 1956 to be applied and for these reasons counsel urged that the Hindu joint property should not be applied to Hindus domiciled in Malaysia.

- (3) Mr. Sivalingam also stated that Hindus in this country did not follow the Hindu joint family system and further conditions prevailing here are such that no similar system can be followed.
- (4) The onus is on the tax department to show such system prevailing among those domiciled here and that they have failed to do. Our written law does not provide for it.
- (5) The relevant provisions of the 1967 Act defines the Hindu joint family as the same prevailing in India. This is also a factor supporting the contention that these provisions are intended only to apply to a Hindu family domiciled in India.
- (6) Hindu law prevailing in India is foreign law — a fact which can only be proved by evidence of an expert — (See *Lazard Bros. v. Midland Bank Ltd.* [1933] A.C. 289, also *Cheshire's Private International Law* (7th Edn.) at pages 115 and 117). No witnesses were called by the tax department to give evidence as to what Hindu joint family means in the system of the law prevailing in India and thus they have failed to discharge the onus on them. Since there is no such evidence there is nothing on record to show that the appellants' families fell within the meaning of joint family in India and therefore they are not liable.

Counsel for the respondent Encik Nizar also submitted written submission and I will refer to that when I consider necessary. Encik Nizar firstly pointed out that before the Special Commissioners, Mr. Sivalingam based his arguments on non liability to pay income tax on the ground that appellants were citizens of this country, and not of India but before the High Court the basis of his argument was on appellants' domicile and Encik Nizar thereupon pointed out that there was no evidence before the Special Commissioners to indicate the domicile of the appellants. But in view of the way I propose to deal with the first question, it is not necessary to make a decision on the arguments made by Encik Nizar.

The learned judge had accepted the view in reference to the practice of Hindu emigrants summarised by Dr. Mallal in his preliminary note at page 787 of *Mallal's Digest of Malaysian and Singapore Case Law* 3rd Edn. This is what the learned judge said:—

"That the law is settled beyond doubt that where a Hindu Family emigrates from one part of India to another, the presumption is that it carries with it its personal law, that is the laws and customs as to succession and family and that such personal law is part of the status of every family which is governed by it. This presumption is rebuttable. It is also settled law, settled by no less an authority than the Privy Council that a Hindu emigrating to a foreign country carries with him his personal law, unless he establishes that he has adopted the law of the people among whom he is settled. The note is backed by a wealth of authority. . . On the law as settled I must therefore hold that where a Hindu shows the deliberate preservation of his personal law, as here in the matter of joint families, he is bound by such personal law despite the fact that he has now acquired a domicile of choice in the country of his adoption."

To my mind, section 72 of the Income Tax Act No. 47 of 1967 (now Act No. 53, 1971 Edition) merely re-enacts what is the personal law by deliberate election of citizens of Hindu origin custom and religion.

With respect, I would purport to take the further point that this view of the law is a matter of great convenience. If the Hindu members of a family so conduct their affairs and write up their accounts on the basis of a joint family, then it does not take much imagination to see how difficult it would be to disentangle such accounts to clarify the liability of each member for income tax. The legislative provision in section 72 must be seen therefore to avoid such difficulties.

But for what it is worth, I would greatly daring, venture to suggest that inasmuch as it lies within the election of the members of a Hindu joint family to partition the assets and to exist thereafter as individuals, the provision in section 72 of the Act cannot be said to be a legislative discrimination against certain citizens. It is their deliberate choice to remain a Hindu joint family. They must be taken to have elected to be treated as such."

In the instant case there is no doubt that both B. and N. by their own choice deliberately preserved their personal law on Hindu joint family. The learned judge in reference to this matter neatly put it thus:—

"With respect, it seems to me that they could, with equal truth and perhaps greater force, have said that the documentary evidence produced and perhaps the other evidence led would establish with a very reasonable degree of certainty the existence of these two families as Hindu joint families. The careful separation by B. of his income from the Agricultural Experimental Green Leaves contract carried out at the partnership premises as his own personal income and distinct from the partnership of Shuparshad and Brothers must, if at all, serve as further confirmation."

I would with respect agree with the views thus expressed by the learned trial judge. That would dispose of the first five points of Mr. Sivalingam's arguments enumerated above.

I will now deal with the next point raised by Mr. Sivalingam namely that Hindu law prevailing in India is foreign law which is a fact that may only be proved by evidence of an expert. He cited the case of *Lazard Brothers v. Midland Bank Ltd.*⁽¹⁾ but in my view the provisions of sections 38 and 84 of the Evidence Act should be considered.

Section 38 reads as follows:

"When the court has to form an opinion as to the law of any country, any statement of that law contained in a book purporting to be printed or published under the authority of the Government of that country, and to contain any such law, and any report of a ruling of the courts of that country contained in a book purporting to be a report of such rulings, is relevant."

Section 84 reads:

"The court shall presume the genuineness of every book purporting—

- to be printed or published under the authority of the Government of any country and to contain any of the laws of that country; or
- to contain reports of decisions of the courts of that country."

In deciding this case the Special Commissioners referred to a text book called "The Principles of Hindu Law" by D. F. Mulla as the source of their information as to the law of Hindu joint family. The learned authors of that book based their views as to the principles of that law on the statutes of India and reports of rulings of the courts of India and of the Privy Council. In my view the opinions formed in that book come within the provisions of section 38 of our Evidence Act and are therefore relevant.

If I may refer to the following taken from *Sarkar* on Evidence 12th Edn. at page 454.

"The difference between the English law and the Act is this that under this section (section 38) books containing statement of foreign laws (published under the authority of Governments of those countries) may be directly referred to by the court; but according to English Law, the foreign law

must be proved by calling experts or professional persons to give their opinions on the subject (see *Taylor* 10th Ed. section 1423 p. 973; *Phipson* 8th Ed. p. 382 section 45 post). Opinion of experts upon a point of foreign law is relevant (see section 45). The English courts cannot take judicial notice of foreign law, which in this connexion includes the law of Scotland, Commonwealth countries, British Colonies and possessions; for foreign laws are usually matters of evidence requiring proof as questions of fact. (See *Guaranty Trust Co. v. Hannay & Co.* [1918] K.B. 623, 667 CA; *Beatty v. B.* [1924] 1 K.B. 807, 814 CA; *Lazard Bros. & Co. v. Midland Bank Ltd.* [1933] A.C. 289, 297, 298 HL: *Hals.* 3rd Ed. Vol. 15 para. 610.)

I would therefore say that the judge was right in his answer to the first question. I would agree with Encik Nizar that in reference to the present case the liability of both the appellants to pay income tax was based on their residence in this country irrespective of their citizenship or domicile. This ground must therefore fail.

I will now come to the next question which reads as follows:—

"(2) If section 72 of the Income Tax Act 1967 (or more correctly section 57 of the Income Tax Ordinance 1947) is held to apply to the appellants it is in violation of Article 8 of the Federal Constitution and therefore void by virtue of Article 4 of the Constitution."

I will now set out the relevant clauses of Article 8:

"8(1) All persons are equal before the law and entitled to the equal protection of the law.

(2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent or place of birth in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

(3)

(4)

(5) This Article does not invalidate or prohibit:—

(a) any provision regulating personal law;

Article 4 reads as follows:—

"4(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

I think I ought to point out that in reference to the words "laws passed before Merdeka Day", the Privy Council in *Surinder Singh Kanda v. Government of the Federation of Malaya*⁽²⁾ explained that:

"If there was in any respect a conflict between an existing law and the Constitution (such as to impede the functioning of the Police Services Commission in accordance with the Constitution) then the existing law would have to be modified so as to accord with the Constitution."

There is one other thing which I should deal with before I go into the substantive question before us. In my view the learned judge was wrong when he stated that he as a judge of the High Court had no jurisdiction to consider this question on the ground that that question is a matter affecting the Constitution. The Federal Court in *Gerald Fernandez v. Attorney-General of Malaysia*,⁽³⁾ has ruled that the High Court

A and in fact all the courts in this country have jurisdiction to consider any question affecting the Constitution. (See also my judgment in *Yeoh Tat Thong v. Government of Malaysia*⁽⁴⁾).

Mr. Sivalingam argued this question in two ways:

(1) Under clause (2) of Article 8 on the ground that this law is a discrimination forbidden by this article.

(2) The general argument on equal protection clause (1) of Article 8.

On the first leg of his argument he read to us Article 15 of the Constitution of India, the relevant part of which reads as follows:—

C "15(1). The State shall not discriminate against any citizens on the ground only of religion, race, caste, sex, place of birth or any of them."

He then pointed out that the word "only" in clause (1) of the Indian Article 15 is of significance. *Basu* in his "Commentary on the Constitution of India" 5th Ed. Vol. I page 508 neatly summarised the significance of the word "only" of Article 15 as follows:—

"But the discrimination which is forbidden by this article is only such discrimination as is based solely on the ground that the person belongs to a particular race or caste or professes a particular religion or was born at a particular place, or is of a particular sex, and on no other ground. A discrimination based on one or more of these grounds and also of other grounds is not hit by the article. (See *State v. Vithal* (1952) 54 Bom. L.R. 626; *Dattatraya v. State of Bombay* A. 1953 Bom. 31; *Anjali v. State of West Bengal* 1952 56 C.Y.N. 80). The significance of the word 'only' is that other qualifications being equal, the race, religion etc. of a citizen shall not be a ground of preference or disability. If there is any other ground or consideration for the differential treatment besides those prohibited by the article, the discrimination will not be unconstitutional."

F *Sheridan and Groves* on the Constitution of Malaysia at page 39 explains the provisions in clauses (1) and (2) of our Article 8 in the following terms:

"No discrimination against citizens. Clause (2) is apparently designed to give citizens of Malaysia protection additional to that given by clause (1) to all persons. Clause (2) will not invalidate discrimination against citizens in the activities specified unless it is solely on one or more of the grounds enumerated. Any discrimination on some other ground (not infringing some article) will be valid even though it may have the incidental effect of discriminating also on one of the grounds listed in clause (2)."

Now to turn to the second leg of counsel's argument. He summarised this part of his arguments under three parts:—

H "(a) section 72 of the 1967 Act (or more correctly section 57 of the 1947 Ordinance) singles out Hindu joint families for special treatment, namely the family is assessed on the aggregate of the income of the members of the family instead of the individual members thereof being assessed separately and individually.

(b) This classification is not 'a reasonable classification' in that the basis of classification (Hindu joint family) reaches only Hindu joint families and does not apply to other families who may be structured on the same basis.

(c) Therefore section 72 of the 1967 Act (or more correctly section 57 of the 1947 Ordinance) violates the guarantee of equal protection of laws contained in Article 8."

Counsel referred to Indian cases dealing with the question of equal protection under Article 14 of the Constitution. The said clause 14 reads as follows:—

"14. The State shall not deny any person equality before the law or the equal protection of the laws within the territory of India."

In this case we are concerned only with the construction of the words "the equal protection of the law" in reference to the facts of this case. Mr. Sivalingam cited to us four Indian cases namely:—

- (1) *Mammad Keyi v. Wealth Tax Officer*;⁽⁵⁾
- (2) *Narayanamurthy v. Commissioner of Wealth Tax*;⁽⁶⁾
- (3) *Keloth Mammad v. Wealth Tax Officer*;⁽⁷⁾
- (4) *V. V. R. Varma v. Union of India*.⁽⁸⁾

In India the Hindu undivided family is assessed to income tax as a distinct entity or a unit of assessment. A member of a Hindu undivided family is not taxable at all in respect of any sum which he receives as a member out of the income of the family; even though the family may not have paid the tax on this income.

In *Mammad Keyi's* case the court held that:—

"The Hindu undivided families of wealth have been singled out by the Act from other similar joint families in the country and the State has thereby denied equal protection of the law to the former."

The other three courts, however, held that the provisions of the Wealth Tax Act dealing with the Hindu undivided family are constitutional. In *Narayanamurthy's* case the court pointed out:—

"It cannot also be held that the rates of tax as given in the schedule providing for different rates for individuals and Hindu joint families amount to unfair discrimination. It is open to Parliament to say that the number of undivided families or non-Hindus is so negligible that it is not necessary to treat them as a separate entity."

Counsel went on to point out:

"that the judge was of the view that the classification was rational in that non-Hindu joint families are so negligible that they could be ignored. In plain terms the Act covered the majority and only the minority was left out. That is not true of the situation in this country. Here the number of Hindu joint families is very small compared to other Hindus or non-Hindus. Thus it is a case of taxing the minority and excluding the majority. It is also a burden on the minority with no rational basis. In India the rigour of the law taxing an undivided family as an individual is mitigated by special provisions granting higher ceiling of deduction on account of insurance premia and by a larger initial margin of income exempt from income tax. But there are no similar provisions in the law of this country."

That was how the question was argued before us.

In reply to that argument Encik Nizar pointed out that the provision pertaining to Hindu joint family is a provision regulating personal law of the Hindu and as such it is excepted under clause (5)(a) of Article 8.

In my view the appeal should be dismissed for the following reasons. Hindu law is the personal law of the appellants and by reason of clause (5) of Article 8 does not invalidate it. The Hindu joint family is the normal condition of Hindu society in India and undivided Hindu family is ordinarily joint not only in estate but also in food and worship. See *Sri Raghunandha v. Brozo Kishore*.⁽⁹⁾ The two Hindu families in this case have by personal choice regarded their property as that of a joint Hindu property. The basis of their liability to pay income tax however, is not solely based on the fact that they were of Hindu religion but

on the fact that they have always regarded their joint property as belonging to one unit and the income of that property as the income of one person.

After we had reserved our judgment Mr. Sivalingam sent us what he calls his additional submissions for the appellant. He had apparently sent a copy to Encik Nizar, with the result that we also received his additional submission in reply. In his additional written submission Mr. Sivalingam referred to the deed of partition executed by N., Kalescharan, B., Srinivas, Kailawati and Premwati, whereby they agreed among themselves that the joint family consisting of themselves as members of the family be separated. After the deed of partition which was done in 1958, the business of Shuparshad & Bros. was registered as a partnership whereby all the partners were described as partners and not as members of the Hindu family. In this case we are concerned with the joint family of B. and N. and according to the Hindu law after separation of one family each member of the family after separation will be the nucleus of another family of which he will be the head. So this argument must also fail.

The appellants will pay the costs of this appeal, and their deposit of \$500/- will be paid to the respondent towards its taxed costs.

Gill and Ong Hock Sim FJJ. concurred.

Appeal dismissed.

Solicitors: *Lim Kean Chye & Co.*

M.N. GUHA MAJUMDER v. R.E. DONOUGH

[O.C.J. (B.T.H. Lee J.) June 24, 1974]

[Kuching — Civil Suit No. K.101 of 1969]

Land Law — Sale of Land — Fraudulent misrepresentation — Breach of contract — Damages — Oral contract — When came into existence — Statute of Frauds.

The property which was the subject of this action was advertised for sale and written offers to purchase were invited. The plaintiff viewed the property on two occasions. During the interval between the two occasions the plaintiff was in communication with the defendant's agent and it was alleged that the defendant had accepted the plaintiff's offer to purchase the property for \$70,000. There had been on the occasion of the second visit to the property some discussion on the mode of payment. There was also no clear agreement on the sale of orchid plants which the defendant wished to sell separately although the matter was discussed between the parties. The defendant denied that he had decided to go on with the sale. The defendant was anxious however, to effect a quick sale as he was desirous of leaving Kuching permanently for Johore Bahru. The question for determination was whether there was a contract in existence between the plaintiff and the defendant at the material time.

Held: (1) the law does not impute an intention to enter into such a legal relationship as that of vendor and purchaser where the circumstances and the conduct of the parties negative any intention of the kind;

(2) the evidence indicated that the parties did not intend to be immediately bound. They had not the necessary *animus contrahendi*. What passed was only a negotiation from beginning to end;